

Matters That Come Before the Public Employment Relations Commission For Decision

The New Jersey Employer-Employee Relations Act established the Public Employment Relations Commission (PERC) to administer and enforce its provisions governing the conduct of collective negotiations in New Jersey public employment. The seven-member Commission is appointed by the Governor with the advice and consent of the Senate. Two Commission members represent public employees, two represent public employers, and three represent the public. The Chair of the Commission is one of the public members. The Commission acts by majority vote in its public meetings to decide matters brought before it by public employers, public employees and public employee organizations. The Commission employs a staff to assist it in carrying out its administrative and decision-making functions.

What follows is a brief description of the kinds of matters that come before the Commission for decision. There are four basic types of cases that come to the Commission for determination: scope of negotiations, unfair practice, representation, and interest arbitration appeals.

SCOPE OF NEGOTIATIONS

The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., requires good faith negotiations over terms and conditions of employment. The Act also requires negotiations over written policies setting forth grievance and disciplinary review procedures. Such procedures may provide for binding arbitration as a means of resolving disputes over terms and conditions of employment. However, the Legislature did not define the phrase "terms and conditions of employment" and did not define what subjects were negotiable and what subjects were not. In the "Dunellen" trilogy of cases decided in 1973, the Supreme Court established the need to determine on a case-by-case basis the subjects that are mandatorily negotiable under the Act, as distinguished from matters of governmental policy exclusively within the prerogative of management or terms and conditions of employment set by statute or regulation.

N.J.S.A. 34:13A-5.4(d) gives the Commission the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. Disputes over the scope of negotiations generally arise in one of two contexts. First, during the course of collective negotiations, one party may seek to negotiate with respect to a matter that the other party contends is not a mandatory subject of negotiations. Second, an employee organization may seek to submit a matter to binding arbitration which the employer contends is a matter of managerial prerogative and not a term or condition of employment. In this context, the employer claims that a matter of managerial prerogative is not a proper subject for negotiations and thus may not legally be included in the contract and may not legally be submitted to an arbitrator as the employer's statutory management responsibility may not be abdicated or delegated or a statute or regulation has preempted negotiations.

A subset of grievance cases involves increment withholdings of teaching staff members. A 1990 amendment to the Act gave the Commission jurisdiction to decide the appropriate forum for review of such increment withholdings. If the withholding is based on the evaluation of teaching performance, arbitration will be restrained and review must be by the Commissioner of Education. If the withholding is not based on the evaluation of teaching performance, arbitration will not be restrained and the withholding may be reviewed by an arbitrator. The Commission makes no judgments about the merits of the withholding, but only decides the appropriate forum for review.

When a scope dispute arises during the course of collective negotiations, the Commission issues a declaration that the disputed matter is either mandatorily negotiable or not. No further order is required.

The Commission's jurisdiction in the grievance context is similarly limited. In an early case involving the Hillside Board of Education and the Hillside Education Association, the Commission explained the nature of the limitations:

Having determined that the matters in dispute in the instant proceedings are within the scope of collective negotiations, the grievances which prompted the filing of this petition can proceed to arbitration, assuming that they are otherwise arbitrable under the parties' agreement. The latter determination is

one which the Commission will not render. The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

The delineation of the separate roles for the Commission, the courts and the arbitrator soon reached the Supreme Court. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed. 78 N.J. 144 (1978), the Supreme Court adopted the Commission's guidelines.

If an employer raises contractual defenses, the Commission cannot address them in a scope decision. A scope decision addresses only the abstract negotiability of the matter the union seeks to arbitrate. Any disputes over whether the subject is addressed by the contract, or if the grievance is timely, or even if the parties have agreed to arbitrate this type of dispute must be resolved by a court or, where appropriate, the arbitrator, if the Commission determines that the matter to be arbitrated falls within the scope of negotiations. Similarly, if an employer raises to a court or an arbitrator a claim that the matter sought to be arbitrated falls outside the scope of negotiations, the court or arbitrator must refer that limited issue to the Commission for determination. Thus, an employer with more than one defense may have to go to more than one forum to have all issues of arbitrability resolved.

Over the years, the language used by the Commission when deciding whether matters in dispute are within the scope of negotiations and therefore arbitrable has evolved. Certain shorthand phrases have since emerged, such as "legal arbitrability" for the negotiability issues to be decided by the Commission, and "contractual arbitrability" for the contractual issues to be

decided by a court or the arbitrator. Early scope cases concluded that grievances on negotiable matters "may be submitted to arbitration if they are otherwise arbitrable under the terms of the parties' collective negotiations agreement. More recent cases recast the conclusion in a scope decision as "the subject of the grievance is mandatorily negotiable and legally arbitrable," or "the employer could legally have agreed to arbitrate this dispute." Whatever the language, because there may be outstanding issues of "contractual arbitrability" which the employer properly has not raised in the scope proceeding, and because any duty to arbitrate derives from the contract between the parties, the Commission only answers the limited question, "Is the matter the union seeks to arbitrate mandatorily negotiable." Disputes over whether the contract requires arbitration and requests for enforcement of a contractual duty to arbitrate must be addressed to the Superior Court.

The guidelines set down nearly twenty years ago still govern. Parties may still have to argue before the Commission, a court and an arbitrator over whether a particular grievance may proceed to arbitration before the arbitrator has an opportunity to address the merits of the grievance. Fortunately, a great many of the issues of both legal and contractual arbitrability have been decided and guide the conduct of public employers and unions alike. Thus, most grievances that are legally and contractually arbitrable, in general, proceed to arbitration without employer opposition. Similarly, most unions do not seek to arbitrate grievances that are not arbitrable, either for legal or contractual reasons.

UNFAIR PRACTICE

Unfair practice charges are filed when one party contends that the other has violated some obligation or interfered with some right established by the Act.

In some cases, the charging party seeks interim relief. A Commission designee is assigned the case and determines if the charging party has a substantial likelihood of success on the merits of its claim and would suffer irreparable harm if relief is not granted. If interim relief is granted, it usually preserves the status quo during the pendency of the case.

Most cases are sent to an exploratory conference where a staff agent tries to settle the case or clarify the issues. In all cases, the Director of Unfair Practices reviews the charge to determine whether the allegations, if true, would constitute an unfair practice. If the Director believes they would not, a Complaint will not issue. That will end the case unless the charging party appeals to the Commission.

When a Complaint issues, the case is assigned to a Hearing Examiner. Sometimes motions are filed to the Hearing Examiner or the Commission. In most cases, no motions are filed and the Hearing Examiner conducts a hearing, issues a report and recommendation, and sends the case to the Commission for a final decision. If no exceptions to the Hearing Examiner's report are filed, the recommended decision becomes a final decision. If exceptions are filed, the case comes to the full Commission which issues a final decision.

In reaching a final administrative decision, the Commission reviews the record in the case. That includes the charge, the transcript of the hearing and exhibits, the recommended decision, and any exceptions, cross-exceptions and briefs. Any post-hearing brief or argument not specifically incorporated in exceptions or an answering brief is not considered.

The Commission generally orders parties to notify the Chair within 20 days how they have complied with the Commission's order. In the event of noncompliance, the Commission or the prevailing party may seek enforcement in the Superior Court.

REPRESENTATION

Representation cases concern elections to determine whether employees wish to be represented by a particular majority representative, and decisions about which negotiations unit, if any employees belong in. Some cases concern claims that particular employees are confidential employees or managerial executives and therefore do not belong in any unit, or supervisory and therefore belong in a separate unit from non-supervisory employees. Most cases are decided on the papers filed with the Director of Representation. If material facts are in dispute, the case is assigned to a Hearing Officer for an evidentiary hearing. The Hearing Officer issues a report and recommended decision, the parties have an opportunity to file exceptions, and the case is decided by the full Commission. Only a handful of representation cases reach the full Commission each year.

INTEREST ARBITRATION APPEALS

The 1995 Police and Fire Public Interest Arbitration Reform Act gave the Commission jurisdiction to decide appeals of interest arbitration awards issued to resolve negotiations impasses involving police officers and firefighters. Previously, the Superior Court considered challenges to interest arbitration awards.

The Reform Act, like the predecessor statute, includes eight factors that an arbitrator may consider in deciding a dispute. They include, for example, the public interest, the financial impact of an award, the cost of living and a comparison of the salaries and employment conditions of the employees involved in the proceeding with employees performing similar functions and employees generally. The arbitrator must analyze the evidence on the factors deemed relevant to the dispute and provide a reasoned explanation for the award. N.J.S.A. 34:13A-16g; N.J.A.C. 19:16-5.9.

The Commission has established a standard of review consistent with pre-Reform Act case law. It will vacate an award if the appellant demonstrates that: (1) the arbitrator failed to give "due weight" to the subsection 16g factors judged relevant to the resolution of the specific dispute; (2) the award is not supported by substantial credible evidence in the record as a whole; or (3) the arbitrator violated the standards in the Arbitration Act, N.J.S.A. 2A:24-8 and -9. N.J.S.A. 2A:24-8 and -9 provide that an award may be set aside on such grounds as bias or the refusal to hear evidence.

Commission decisions recognize that fashioning a conventional award is not a precise mathematical process and that the Act entrusts the arbitrator with weighing the evidence and arriving at an award. However, the Commission has held that an arbitrator should state what statutory factors he or she considered most important in arriving at the award, explain why they were given significant weight, and explain how other evidence or factors were weighed and considered in arriving at a final award. Once an arbitrator has done so, a party appealing an award must offer a particularized challenge to the arbitrator's analysis and conclusions.

APPEALS FROM COMMISSION DECISIONS

As with any final administrative agency determination, Commission decisions may be appealed to the Superior Court, Appellate Division within 45 days of the Commission decision. The General Counsel or Deputy General Counsel will generally participate in an appeal.

RULEMAKING

The Commission periodically adopts and readopts rules governing practice before the agency. Rulemaking proposals are approved by the Commission for publication in the New Jersey Register. They are then subject to a public comment period before final adoption.